

# USACE Shut Out of WOTUS

Retired General Says Corps Excluded from Process

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A former Corps of Engineers official told Congress his agency had little input on the waters of the United States rule. (DTN Photo by Chris Clayton)

OMAHA (DTN) -- The Army Corps of Engineers was shut out of the waters of the United States rule making process, even though EPA indicated the WOTUS rule was drafted in a joint effort with the Corps, a retired major general told a U.S. Senate Committee on Wednesday.

Retired Major General John Peabody, who was the deputy commanding general for Civil and Emergency Operations from October 2013 through August 2015, said in written testimony to the U.S. Senate Environment and Public Works Committee that the Corps of Engineers played virtually no role in drafting the WOTUS rule.

Peabody was one of five witnesses called to testify before the EPW committee as part of a review of the scientific and legal basis for the WOTUS rule.

Current EPA Administrator Scott Pruitt announced in March the agency was prepared to consider a rewrite of the rule. In addition, sometime this year the U.S. Supreme Court will consider whether the U.S. Court of Appeals for the Sixth Circuit in Cincinnati is the proper venue for the many lawsuits filed.

In August 2015, 105 pages of Corps memos were released by the U.S. House of Representatives Oversight and Government Reform Committee.

The release came despite a request of Congress from Jo Ellen Darcy, who was the assistant secretary of the Army for civil works, to keep the memos out of the public eye. All the documents were stamped as "litigation sensitive" as they outline

concerns from Corps legal counsel just weeks ahead of the release of the final rule.

On Wednesday, Peabody spoke publicly for the first time about the drafting of the WOTUS rule.

"Beginning in November 2014, the Corps was marginalized from substantive participation in the rule-making process," Peabody said in his written testimony.

"Specifically, in late November or early December 2014 Corps staff made me aware that we were no longer being invited to the rule-making meetings, and therefore our involvement in developing the rule language had ceased. When I advised Ms. Darcy that Corps personnel were no longer being invited to rule meetings that were still being held, she re-confirmed that this was contrary to her specific direction, and she emphasized that she wanted Corps experts at the meetings. Although I assumed this would resolve the issue, notwithstanding her direction, nothing changed. I brought this up two or three more times in early 2015, but with no effect."

Ken Kopocis, former deputy assistant administrator for water at EPA when the rule was drafted, said in his written testimony the rule was a cooperative effort by both agencies. Kopocis now serves as an associate professor at American University Washington College of Law in Washington, D.C.

In addition, Kopocis questioned the need to rewrite the rule.

"The Clean Water Rule was developed and issued by the two agencies to ensure that the nation's waters could continue to provide these essential benefits, making waters better protected from pollution and destruction by having the scope of the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science," he said in written testimony.

"Unfortunately, the rule's benefits of clarity, predictability and consistency have been put on hold by the Sixth Circuit, but that will ultimately be resolved. I personally am very aware of the controversy surrounding the scope of the Clean Water Act, but I also believe it is a disservice to the public that the current administration has indicated that it will undertake a new rule-making to replace the clean water rule."

Peabody said EPA provided to the Corps a copy of the revised preamble to the rule for the first time in early March 2015. The next time the Corps saw the final draft, he said, came after it was sent to the Office of Management and Budget in early April 2015.

That version of the rule "contained some statements we had not previously seen that were factually inaccurate, especially regarding the Corps," Peabody said.

"What was of greatest concern to me personally, and to the Corps senior leaders and staff with whom I discussed this issue at that time, was not that the Corps was excluded from most of the process of developing the rule," he said.

"The more concerning issue was that the marginalization of the Corps had caused Corps' expertise, concerns and related recommendations -- founded on serious and significant concerns with the viability of the rule from a factual, scientific, technical and legal basis -- to be so completely disregarded. Whenever we received periodic access to see updated versions of the draft final rule text or preamble, the serious concerns the Corps had repeatedly communicated were left largely unaddressed."

The preamble to the final rule indicates the rulemaking was a joint effort of the EPA and the Corps. In addition, it says both agencies jointly reached "significant findings," and that the agencies came to important conclusions based on their experience and expertise.

"These statements and characterizations are untrue," Peabody said.

Corps staff raised a number of technical concerns about the final rule.

One of those concerns centered on a provision that says if lakes, ponds and wetlands are found to have a "significant nexus," or connection to waters regulated as jurisdictional waters, the entire water body is jurisdictional. The final rule says waters will be regulated as long as a portion is located within the 100-year floodplain or within 4,000 feet of an ordinary high-water mark or high-tide line.

As a result, the Corps indicated to EPA the 4,000-foot provision was not based in science and should have required EPA to conduct an environmental impact statement.

When contacted by DTN regarding the release of the Corps' memos back in August 2015, an EPA spokesperson said the internal memos released showed what were typical "internal, deliberative Army/Corps documents." Because of ongoing litigation, the Corps of Engineers declined comment at the time.

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